No. 2875

# United States
# Circuit Court of Appeals

For the Ninth Circuit.

## Oral Argument and Authorities.

CHARLES H. MOYER, as Trustee for the Western Federation of Miners, etc., CHARLES H. MOYER, C. E. MAHONEY and ERNEST MILLS, as Members of the Western Federation of Miners, etc.

Appellants,

vs.

THE BUTTE MINERS' UNION,

Appellee.

Upon Appeal from the United States District Court of Montana.

CANNING & GEAGAN,
E. P. KELLY,
of Butte, Montana;
HON. O. N. HILTON,
CAESAR A. ROBERTS,
LESLIE M. ROBERTS,
of Denver, Colorado;
Solicitors and of Counsel for Appellants.



SMITH BROOKS PRESS DENVER

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vs.

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Appellee.

May It Please the Court:

In the printed transcript of the record, there are about 128 pages of duplicate documents, that even, as original exhibits are, in our view, wholly immaterial to the issues in this case, but possibly they answer some purpose of the appellee which placed them there. With these exsected, the record is of ample size, but swelled to an unnecessary proportion,

the matter we think, is properly called to the attention of the court. Therefore, in order to aid the court most expeditiously to reach the essential factors, we shall at this time make a restatement of the facts.

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## STATEMENT OF FACTS.

The Butte Miners' Union first became an association about 1878, and then became a body corporate on or about the 16th day of April, 1881, under the name of The Miners' Union, under the laws of Montana.

Its declared purpose at that time was (Tr., p. 157):

> "To protect the interests of the membership of said association, to enable it to hold such property as may be necessary for the protection of its good and the advancement of the interest of the same, and to enable it to establish subordinate organization and to become a body politic and corporate in law."
>
> (Also Tr., p. 450.)

From this declaration it will be seen that the corporation was benevolent and social in its character—at least it was not for pecuniary profit.

While the laws of Montana limit the purposes for which corporations may be formed, nevertheless to lodge and church and associations, not for pecuniary purposes, are granted, by Sections 4225 and 4226 of the Revised Codes of Montana, certain unusual

privileges in that they may own real and personal property conjointly and manage the same conjointly and the respective governing bodies of such corporations, may act in conjunction in incorporating under these sections.

As the Butte Miners' Union was not for profit it could, by express statutory permission, and did avail itself of the benefit of these sections. It had existed from 1881 to May, 1893, and it then felt the necessity of extending its usefulness and to that end joined to itself and itself joined with other organizations having similar objects, so that in 1893 it became the decisive factor and the dominant factor in forming the Western Federation of Miners, the appellant herein.

The underlying reason for this action is best expressed in the language of Patrick Meaney, who was president of the Workingmen's Union, the forerunner of the Butte Miners' Union, and who has resided in Butte for more than thirty-seven years. He says:

> The main purpose of the formation of the Western Federation of Miners was to relieve the Butte Miners of putting up money that was draining from them in support of the Coeur d'Alene strike of 1892, and to get all the unions formed into an organization of miners that would aid the cause. That was one of the things, and in that way it would relieve Butte of the drain. This organization was formed in the Miners' Hall in Butte, in the month of May, 1893. The Butte Miners' Union issued the call

> for it, and Mr. Breen made the motion appointing a committee of five of the Butte Miners' Union, which constituted Tom Nolan, Charles O'Brien, William McLean and John Gilligan. They communicated with the various miners unions throughout the West, for the purpose of meeting in Butte some time in the middle of May, I have forgotten the exact date, for the purpose of forming a western miners organization, or a miners organization of the west. They had not determined the name of it until the convention had met. John Gilligan was the first president of the Western Federation of Miners and William Weeks was the first Secretary.
>
> (Tr., p. 476.)

Then, on the 15th day of May, 1893, in the Miners' Union Hall in Butte, Montana, the convention was called to order for the purpose of organizing or forming a federation (Tr., p. 480). There were represented in that convention the states of Montana, South Dakota, Colorado, Utah, Idaho, comprising a total of SEVENTEEN organizations, which then and there received their numbers from 1 to 17, and all received an identical charter of which Butte took No. 1 and Aspen, Colorado, took No. 6.

One of the first declarations of the organization meeting was,

> On motion The Western Federation of Miners is composed of unions represented in this convention. (Tr., p. 483.)

One of its declared objects was,

Seventh, To use all honorable means to maintain

> friendly relations between ourselves and our employers, and endeavor by arbitration and conciliation to settle such differences as may arise between us, and thus make strikes unnecessary. (Tr., p. 486.)

And in the First Article of its Constitution it declares:

> Section 2. The object of this Federation is to unite the various Miners Unions of the West into one central body; to practice those virtues that adorn society and remind man of his duty to his fellowman; the elevation of his position and the maintenance of the rights of the miner. (Tr., p. 487.)

And still further in pursuance of these purposes they say:

> Resolved, That the first official act of The Western Federation of Miners, shall be the writing of a letter to the Labour Bureau of both houses of Congress, demanding a Congressional investigation of the labor troubles in the Coeur d'Alenes, Idaho." (Tr., p. 514.)

In that same month of June, 1893, the Western Federation of Miners sent to the Eureka Miners' Union $200, to assist them (Tr., p. 516), and $500 for the use of the Coeur d'Alene strikers (Tr., p. 517), and in October of the same year it sent $500, through John Gilligan of the Butte Union, to the distressed families in the Coeur d'Alenes. (Tr., p. 518.) Hence the very purpose that the Butte Miners' Union had in view, relief from the drain by reason of the

strike at Coeur d'Alene, was taken over by the Federation and seventeen constituent organizations, in place of falling upon Butte standing alone.

It is essential to notice that the Butte Miners' Union has formed, for its own purposes, a central body.

This action was in keeping with the express terms of the Montana statute, which provides:

> "Every corporation, as such, has power 7 To enter into any OBLIGATIONS or CONTRACTS ESSENTIAL to the transaction of its ORDINARY affairs, or for the PURPOSES of the corporation."
>
> (Revised Codes of Montana, Sec. 3889.)

The Butte Miners' Union was the only authority which could determine that the formation of a Federation was ESSENTIAL to the transaction of its ordinary affairs and for the purposes of its corporation.

And in construing this identical statute, where a corporation had formed a partnership with individuals, the Supreme Court of California says:

> "There is no rule of law that will preclude a corporation from entering into a contract with an individual which will have the effect to carry out directly or indirectly the OBJECT of its incorporation, and to provide in that agreement that the gains or losses of the venture shall be borne equally by both parties.
>
> Section 354 of the Civil Code provides: Every corporation as such has the power to enter into any obligations or contracts essential to the

transaction of its ordinary affairs, or for the purposes of the corporation.

Whether a contract is 'essential' to the transaction of its ordinary affairs, or for the purposes of the corporation IS TO BE DETERMINED BY THE CORPORATION or those to whom the management of its affairs is entrusted.

If it is within the apparent scope of its organization, the fact that the contract has been entered into by it, or by its representative, is a DETERMINATION on the part of the corporation that it is ESSENTIAL and the corporation WILL NOT BE PERMITTED THEREAFTER TO QUESTION ITS EFFECT."

Bates v. Coronado Beach Co., 109 Cal., 160; 41 Pac., 855.

In 1893 the Butte Miners' Union then secured the co-operation of all the locals in all the western states, and in common with them bore its proportionate share of burdens, and only its proportionate share of burdens, and received its full share of benefits and advantages.

It participated in every annual convention of the Western Federation of Miners until the year 1915.

It was present and through its own large delegation dictated various amendments to the Constitution and passed the following amendent:

"Amend by adding to 'The Duties of President' in Art. 4, Sec. 1, after the word Miners, page 9, line 37: The President, shall have power on petition of ten per cent of the members in good standing in their respective locals making charges in writing against their local officers to take complete charge of the local's affairs,

> and if the charges are proven he shall call a special election within thirty days and place the local's affairs on a business basis before relinquishing to the local's officials."
>
> (Tr., p. 97.)

This complete union of purpose, identity of objects and mutual dependence existed without interruption for more than twenty-two years.

In June, 1914, on the 13th day there was such a reign of violence within the Butte Miners' Union that its property was destroyed and with it the charter issued to it in 1893.

It only needs to be stated, to be admitted as a fact, that the destruction of the paper document was by no means the destruction of the charter, because the contract between the Federation and its organizations, and hence, between each other, existed in principle and in practice. But the radical members, what are known as direct-action men, men who believe that the destruction of the physical evidence is the destruction of the principle, conceived the idea that by destroying the charter, they could destroy the relations of the Butte Miners' Union not only to the Federation, but to all the other locals, and the attitude of those men is best expressed by the defendant's witness, Pat Leahy, who says:

> "I guess that charter that was received in 1893, was blown to hell or to some other foreign country, wherever it went I don't know, but the

hall was blown up. I never saw it after the 13th of June."

(Tr., p. 441.)

The utter disregard of rights and property, expressed in the coarse and profane words by this witness, well expresses the attitude of the few who had determined on the destruction of the Butte Miners' Union, which had then fallen from its high estate into a rebellious and turbulent body, which in this position became a ready prey to the vehemence of the radical element that had successfully injected into the body corporate the principles of speedy dissolution.

On September 22nd, 1914, the Butte Miners' Union, by a majority vote of its membership, forced its officers and directors to make an application for a reissue of the charter, and in that application tendered the following consideration:

> "It is hereby agreed in the acceptance of the said charter that the aforesaid corporation shall conform to all of its provisions and that the same are fully understood, and to the constitution, by-laws, rules and regulations of the Western Federation of Miners."
>
> (Tr., p. 203, Exhibit A.)

The charter was then reissued by the Western Federation of Miners on the 3rd day of October, 1914.

When the charter was received, Charles Baxter, ~~William E. Deeney~~, Pat Leahy, Pat Lee, ~~James J. Maher~~, conceived the idea of rejecting the charter

by claiming that it did not contain the same conditions as the charter issued May 15, 1893.

The turbulence continued, and so successfully had these parties continued the fomentation of internal dissensions, that on November 23rd, 1914, a large number of the members of Butte Miners' Union petitioned the Western Federation to assume charge of its affairs, reciting that the officials and trustees of said union are acting in violation of the Constitution of the Butte Miners' Union and of the Western Federation of Miners, and further, that "there has been utter inefficiency and disregard of the best interests of the organization and the principles of unionism." And further,

> "that indifference to the welfare of the organization is clearly manifested by the failure of the various officials and trustees to keep in good standing."
>
> (Tr., pp. 205-206.)

In accordance with that petition on December 7, 1914, proper authority was given to Guy E. Miller of Butte to take charge of the affairs of the union as provided by the Constitution.

(Tr., p. 207.)

From that time, December, 1914, until June, 1915, constant, repeated, patient efforts on the part of the Western Federation were made to adjust the distressful affairs of this once great union, and to restore it to local control. Repeated promises and

agreements were made by the parties, but the defendants herein absolutely refused to allow peace and quiet and local control to prevail, and in a series of bumptious resolutions, utterly without foundation in fact, proceeded to withdraw from the Western Federation, reciting, amongst other things,

> "That the Butte Miners' Union, a corporation, hereby rescinds and repudiates any CONTRACT that heretofore existed and may at present exist between the said The Butte Miners Union, a corporation, and the Western Federation of Miners, by reason of said charter as aforesaid, or in any other way, and hereby declares the same null and void."
>
> (Tr., p. 234.)

This statement of facts is the basis of the action now before this court, wherein the Federation, not on its own account, but as a Trustee for the more than one hundred organizations composing the Federation, seeks to secure a compliance with the Constitution, the rules and regulations of the order.

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## THE LEGAL ISSUES INVOLVED.

First. In its Trustee capacity and on behalf of the subordinate organizations, the appellant herein seeks to enforce the trust imposed on it and to protect the interests not only of all the locals, but of those conservative members of the Butte Miners' Union that have been driven from it by the direct

action of the malcontents, and to prevent less than ten men from seizing the property of the Butte Miners' Union and wresting it from its benevolent purpose and converting it to their own personal use.

Second. In answer to this bill, the appellees plead that the contract of association was *ultra vires* the corporation, and that the reissued charter differed in substantial particulars from that of May 15, 1893.

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## THE PLEA OF ULTRA VIRES.

First of all, before the plea of ultra vires can be even entertained, the party pleading it to an executed contract, ought not to be heard, unless it accompanies its plea with an offer to return any advantage that it has received by reason of the contract, and to restore to its first estate the party acting in good faith with it and coming into the court offering, as a condition precedent to being relieved, that it offers to do equity.

*Therefore, whatever of substance there may be in the plea, it cannot, in our view, be entertained at this hearing until the offer to do equity is made.*

It is in evidence in terms that the Western Federation of Miners defended suits brought against the Butte Miners' Union involving large sums of money and recovering of moneys advanced on mortgages.

(Tr., p. 326 et seq.)

It is significant that the appellees are interested

in this matter only that they seek to become owners of the property of the Butte Miners' Union. These men, the president, secretary and board of trustees, were the ones that declared that THEY "repudiate and rescind any CONTRACT" that heretofore existed between the Butte Miners' Union and the Federation. They admit that they have been acting under a contract, and without any official action other than the usurpation of authority by the appellees who intend to profit personally by this suit, they "rescind a contract" acted under for twenty years. Seventeen subordinate organizations composed the Federation in 1893, and to-day over ONE HUNDRED subordinate organizations compose the Federation, and every one of these hundred organizations is interested in enforcing the rules and regulations of the Federation in order that the strongest local and the weakest local may receive even-handed justice, so that no recreant body, in a time of trial and turbulence, may wrest itself from the parent organization, and by high-handed acts wreck an organization that for more than twenty years has been a beneficial activity in protecting, aiding and assisting to better the conditions of the individuals who compose it.

The character of the Federation in this suit is that of a trustee acting in behalf of every member of every subordinate organization.

The character of the appellees in this suit is to

seize and distribute to themselves, personally, the property of the Butte Miners' Union.

These are the evidentiary facts upon which the appellees seek to have heard their plea of *ultra vires.*

You will search the record in this case in vain, for any action of the Butte Miners' Union, as a union, looking toward the interposition of this plea, but you will find declaration and clamor interposed by these defendants, the appellees, sitting as a star chamber body and using the name of the Butte Miners' Union as a specific name under which to accomplish the purpose of the final disintegration of the union, by preventing the proper trustee from taking hold of the affairs of the union and rehabilitating it.

As prefactory to the discussion, let us restate the rule of *ultra vires.* In its first, or primary sense, it means:

> An act which transcends the powers, conferred by law, on the corporation; something beyond its scope which it has no power to perform under any circumstances or for any purpose.
>
> Minnesota Threshing Co. v. Langdon, 44 Minn., 37 (41); 46 N. W., 310.

In its secondary sense it is

> An excess of authority; something done in violation of the rights of a minority; or an act irregularly done.
>
> Bell v. Kirkland, 102 Minn., 213 (218); 113 N. W., 271; 13 L. R. A. (N. S.), 793.

In its primary sense the act is void. In its secondary sense, it is voidable only, and under these conditions the plea of *ultra vires* never prevails, where, if sustained, the result would be to work injustice or harm.

In this case we are not concerned with the primary rule. We are concerned with it in its secondary sense.

Whether or not an act of the corporation is *ultra vires*, in the secondary sense is to be determined by the rules of logic; by sound reasoning and the results that come from one determination or the other.

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## POSITION OF APPELLEES.

It is very certain that the appellees have never been, since the inception of this suit, in position to offer any complaint as to the management of the affairs of the Western Federation.

Before it could be heard on any question of that sort it must exhaust the remedies provided for by its internal discipline. Article XX of the Constitution of the Federation provides that—

> Section 1. Whenever a vital circumstance, not otherwise provided for, arises and the same cannot in justice be deferred until the assembling of the convention, the Executive Board may submit any important question so arising to a referendum vote of the entire membership in good standing, in the manner described in

section 1 of Article XIX. The majority of such vote to govern in all cases submitted.

(Tr., page 400.)

And Article XIX provides that the initiative and referendum shall govern all legislation.

(Tr., pp. 399-400.)

There is also a provision that between conventions the Executive Board shall constitute the Federation Board of arbitration and conciliation.

(Tr., p. 382.)

So that it will thus be seen that there is ample provision for taking care of every dispute, for looking into every vital circumstance and for immediate relief and investigation by the entire body of unions, where one union may feel that its action is misunderstood or the governing board in its view, may be oppressive.

The Federation, as trustee, acted upon the petition of the required number to take charge of the affairs of the local union.

Now, if this petition was not representative of the body of Butte Union, or if the board of trustees differed from the petitioners as to procedure, a vital circumstance was present and a referendum could have been instantly obtained.

This action is a condition precedent to any plea that may be interposed by the appellees.

The first and paramount duty, the duty which

if left undone will estop a subordinate body from complaining of the supreme body in the courts; we say, the first and paramount duty was for the officers of the union to state that an emergency existed; that a vital circumstance was present and to demand relief from the Federation itself.

This duty being left undone, we submit that the appellees cannot be heard on any plea, until as a condition precedent they show to the court that they have exhausted the remedies provided for internal management by an appeal to the supreme body in accordance with the Constitution.

In the answer (paragraph 17, Tr., p. 37) the appellees admit the acceptance of the charter on May 15, 1893, but deny any authority to enter into that contract under the laws of Montana; in paragraph 28 (Tr., pp. 42-43) they admit that they destroyed the property of the Butte Union, and in paragraph 31 (Tr., p. 44) that they applied for a new charter which they refused to accept.

Here again might be called a vital circumstance.

If the charter was not such a charter as they believed themselves entitled to (and let it be borne in mind that no official action was taken to reject it), they could apply and have the matter determined by a referendum vote. Here again they violated the rule of law as to exhausting the remedies provided for internal discipline, in paragraphs 36 and 37.

These facts all appear from the original plead-

ings. As a sample of the clamor that is characteristic of the amended answer to the amended bill of complaint, we call the court's attention to paragraph 18, at page 218 of transcript, as printed:

> "18. That the plaintiff, Western Federation of Miners, is no longer a bona fide labor organization. That it is but a pretense and a sham, whose only purpose is to collect moneys for the purpose of paying salaries, hotel bills, etc., so as to keep the above-named plaintiffs Moyer, Miller, and the above-named Lowney, Mahoney and O'Bryne and others in idleness at the expense of the miners and others in the country, who yield to their persuasions or succumb to their bluffs."

This street oratory has been expressly condemned by this court. Before a complainant can come into this court he is required to comply with the equity rule (Rule 94, found in 29 Supreme Court Reporter at page xxxvii), which provides that a complainant

> "must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and if necessary the share holders, and the causes of his failure to obtain such action."
>
> Smith v. Chase & Baker Piano Mfg. Co., 197 Fed., 466 (470).

The bill in that case contained the general assertion that the action of the defendants "was in pursuance of a contract, craftily, corruptly and fraudulently entered into between two corporations," and

because of the generality of the allegation the rule prevailed that the bill was not sufficient to sustain a cause of action. In this case the court further said:

> "It would seem that complainant desired litigation more than an adjustment of existing troubles,"

because in that case the complainant was asked to attend a meeting involving a rearrangement of the relations existing between the contending corporations, and then adds that "such conduct does not comply with either the letter or the spirit of the rule."

Smith v. Chase & Baker P. Mfg. Co., 197 Fed., 466 (470), and concludes,

> Corporations controlled and managed by the same officers and stockholders have a right to deal with each other and courts will not interfere with their internal affairs, unless the actions of the majority in control are dishonest or fraudulently oppressive to the minority. Losses resulting from either ignorant or even foolish management cannot be recovered. A bill founded upon fraud or misconduct which does not allege with certainty and definiteness tangible facts to sustain its general averments of such fraud and misconduct, is insufficient and cannot be sustained.

Smith v. Chase & Baker P. Mfg. Co., 197 Fed., 466 (471).

This salutary and proper rule applies as well to a defendant, asserting an affirmative defense, as to a complainant.

The charge is here, in most general terms, namely,

> "That the plaintiffs are collecting money so as to keep them in idleness and others in idleness at the expense of the miners and others in the country who yield to their persuasions or succumb to their bluffs."

This is iterated and reiterated in paragraphs 19, 20, 21, 22, 23, 24, 25 and 26.

It complains at paragraph 8 of its amended answer (Tr., page 213) that it has paid out over a million dollars. During that time the Western Federation has disbursed many millions of dollars in benefits. The Western Federation has not now and never has accumulated a surplus. Its revenue is fixed by its Constitution; the per diem of its officers is fixed to be paid under certain circumstances, and its duty is that of relieving necessities and bettering the conditions of those engaged in mining, milling and the smelting of ores. To the distressed in Michigan alone it paid out over one million dollars during the year 1914, and it is as a disbursing, adjusting and conciliating factor that the Western Federation has always existed and because the Butte Miners' Union would not stand the burden, but determined that the drain upon its resources should be shared by every western miner; that the Butte Union insisted on forming a Federation to help it sustain that burden, and for more than twenty years the locals varying from sixty to over 120 have

each paid in their share as required by the rules and regulations of the Federation, all of which sums have been paid out and accounted for.

Possessed by an insane desire to destroy, the malcontents destroyed the property of the Butte Union, and its books and papers, and with those records where they cannot be reached, the defendant appellees now come forward, not as a representative of the Butte Miners' Union, but as we assert for their individual aggrandizement, and interpose the plea of *ultra vires* of the Butte Union.

We are here to insist that a status which has been created by the Butte Union shall not, at the instance of the Butte Union, be ignored to the prejudice of the other organizations.

This contention this court has time after time upheld. In a very recent case a corporation had entered into partnership with individuals; capital was advanced, profits shared, and then the corporation sought to plead *ultra vires*, so that it might prove a claim against its partners in bankruptcy, and this court said:

> While a contract of partnership entered into by a corporation with natural persons may be *ultra vires* and not enforceable, while executory, nevertheless, after it has been executed, and the corporation has embarked its funds in and supplied goods to the firm such funds and goods cannot be exempted from liability for the partnership debts.
>
> Wallerstein v. Ervin, 112 Fed., 124.

And again in this court,

> The principle that a corporation will not be permitted to plead *ultra vires* as a defense to an executed transaction applies where the contract is completely performed on both sides, in which case the court will not interpose to restore either party to its former estate or grant other relief, but relief will be granted if it can be done independently of the contract or a new or independent consideration subsists in support of the transaction sought to be enforced.
>
> City of Santa Cruz v. Wykes, 202 Fed., 357 (371).

At bar we have the facts that twenty years of close relationship preceded the action in this case, which was taken on petition of the conservative members of the Butte Union to preserve their autonomy, and the new consideration is that as trustee, the Federation is compelled to perform the duty of rehabilitating the union, and if that cannot be done in the limitation set, to hold the property as a trustee for the benefit of the contributing organizations which are entitled to it.

There is no longer any doubt that a corporation can act as freely and as fully in reference to all business, as an individual, and this very freedom is essential to the continuance of a rapid interchange of business and a reciprocity of advantage.

Indeed, one state, Arizona, does provide in terms that in its charter articles a corporation may claim all the powers that an individual would have to con-

tract under like circumstances, and as early as 1872 the state of Illinois had laid down the doctrine that

> "Where corporations have exercised powers incidental to those conferred, and in furtherance of the general objects of the corporation, although the subject of the contract may not be within any express right conferred, they will be estopped from denying that they had authority to make such contracts. Good faith to third parties who deal with such corporations and who have no accurate knowledge of the extent of their powers, requires the adoption of this salutary rule. The rule has its foundation in the plainest principles of natural justice.
>
> When such corporations have received the benefit of a contract, if there is nothing in it that is contrary to public policy, there can be no just reason why they should be required to perform it.
>
> Common honesty requires that when a corporation has conducted through a series of years a business incidental to and advantageous to the objects and purposes for which the corporation was created, that although not within the express terms of their charter, they should be estopped to deny that they had rightful authority to make contracts in that regard, and should be held liable for the damages that may accrue in their breach. The liability for the damages arising on the breach results as a corollary from the right to contract."
>
> Chicago Building Society v. Crowell, 65 Ill., 453 (459-460).

Because individuals merge into a fictional body called a "corporation," does not alter the fact that the individuals must be held to the same account-

ability, as though unincorporated, and this view is thus expressed in a case decided within one year:

> When the rights of the state, the public and the creditors are eliminated, and only the rights of the stockholders are involved, the form of the fictional body termed a "corporation" does not hamper the court in the least in dealing with the rights of the parties.
>
> And that which the individuals composing the corporation might do, will be held to have been done among themselves and will be dealt with without regard to the IMMATERIAL FACT, that they were members of a fictional body.
>
> No citation of cases is necessary to establish the well-settled doctrine that courts of equity will disregard the corporate form, where justice requires it, and its retention is not needed to protect some interest requiring protection.
>
> To permit stockholders to make a unanimous disposition of the corporate property, where no one's else rights are in any way prejudiced, and afterwards to repudiate their action upon the ground that it was beyond the power of the fictional body to do the act, could serve no useful purpose and would be merely available in aid of fraud.
>
> To hold under such circumstances, that those who have unanimously done the act cannot repudiate it is certainly consonant with good morals and fair dealings and violated no principle which is necessary to the protection of the rights of those concerned in and with corporations.
>
> In cases where stockholders have all assented to corporate action and no rights of the state or creditors intervene, the doctrine of estoppel is

fully applicable and the plea of *ultra vires* is unavailing.

Perkins v. Trinity Realty Co., 69 N. J. Equity, 723; 61 Atlantic, 167.

(Citing)—

Taylor on Corporations, Sec. 266.

McCampbell v. Fountain R. R. Co., 111 Tenn., 55; 77 S. W., 10, 70.

Martin v. Niagara Falls Paper Co., 122 N. Y., 165; 25 N. E., 303.

Holmes v. Willard, 125 N. Y., 75; 25 N. E., 1083.

Followed and adopted in

Lincoln Court Realty Co. v. Kentucky etc. Trust Co., 185 S. W., 156 (158).

A review of the authorities on *ultra vires* in its secondary sense shows that the settled law is, that when a corporation goes outside of its business and makes and executes a contract of which it has received the benefits, the courts will not listen to the plea of *ultra vires*.

Crowder State Bank v. Aetna Powder Co., 138 Pac., 392.

First Nat. Bank of Wallace v. Callahan Mining Co., 155 Pac., 673.

National Surety Co. v. Hall-Miller Decorating Co., 104 Miss., 626.

And again in a very late case the court takes occasion to restate the doctrine as follows:

Any act done or agreement made by a cor-

poration by and through its proper and duly authorized officers with an honest view of serving the corporate ends in a substantial sense, which is in itself lawful and not prohibited by charter or otherwise, will be considered within the corporate powers as against an after claim that such act is *ultra vires.*

THE DOCTRINE OF *ULTRA VIRES* CONCERNS ONLY THE CORPORATION IN ITS RELATIONS WITH THE STATE AND WITH ITS STOCKHOLDERS and is never entertained where it will injure innocent third persons.

The defense of *ultra vires* to the enforcement of a corporation contract IS NEVER SUSTAINED BY THE LAW OUT OF REGARD FOR THE CORPORATION and is sustained ONLY when the most persuasive considerations of PUBLIC POLICY are involved.

Huntington Brewing Co. v. McGrew (Ind.), 112 N. E., 534.

It must also be borne in mind that the Butte Union is not incorporated as a labor union. That it is incorporated as a social and a beneficial corporation. As such social and beneficial corporation it may enter into any contract that is essential to the furtherance of its purposes, and it may *conjointly incorporate* under the laws of Montana, so that it may *conjointly hold property* with other corporations of like purposes.

As a labor union, per se, its incorporation would not be recognized by the state of Montana; but as a corporation "to protect the interests of the member-

ship of the association and to enable it to hold such property as may be necessary for the protection of its good and the advancement of the interest of the same and to enable it to establish subordinate organizations and to become a body politic and corporate in law" (Tr., p. 157), it is given extraordinary privileges of conjointly incorporating and of conjointly holding property, by statute in these words:

> "In case two or more of the associations mentioned in this chapter own or are desirous of owning real or personal property CONJOINTLY and managing the same conjointly, where pecuniary profit is not the object, they may each by resolution adopted in the same manner as hereinabove provided in this section, instruct their trustee or director to act in conjunction in incorporating under the provisions of this chapter."
>
> Section 4225, Code of 1907 of Montana.

Briefly, we have before us a beneficial corporation, not for pecuniary purposes, acting CONJOINTLY with another association and conjointly owning and managing real and personal property; we then have the one corporation soliciting the association, its conjoint association, to take charge of its affairs and to rehabilitate it; and under this condition, without appealing to the referendum powers of the conjoint associations, without attempting to use the means provided by the rules of internal discipline, interposing the defense of *ultra vires* to the contract of conjoint association.

Here is a corporation, wholly benevolent, in no way touching considerations of public policy, with a legal and equitable contract, executed for over twenty years, and now a dissolved association, declaring that it had no power to make the contract and asking to be relieved therefrom, not by the association, but by the nominal officers, joined with other appellees herein.

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## PLEADING INTERNAL DISCIPLINE AND REGULATION.

We say to the court now here, that if in answer to the bill of complaint, the appellees had interposed the plea, that they had not had an opportunity to resort to the usages and customs of the conjoint associations, provided for in emergencies; that they desired a referendum vote upon a matter of association procedure and that they had a plain and adequate remedy within the conjoint associations, and that this must first be availed of, the District Court would have held the plea to be sustained and would have dismissed the bill on the ground that it was the duty of the conjoint associations to settle their differences before coming into court, because all beneficial associations having special objects must conduct their own affairs according to the provisions of their Constitution, their rules and regulations, and it is only when there is an affirmative showing that these

have been exhausted that the courts will entertain a suit of adjustment.

But, the appellees are here on their plea, and we say that the plea of *ultra vires*, without any showing of appeal to internal discipline and regulation, for that reason, among others, is wholly insufficient in law or equity.

On the part of the Federation, it has complied with the laws of its organization; it has received and acted on the petition of the required number; it has asked to take charge and adjust affairs, and it did make an arrangement whereby the affairs of the local were carried on all the trouble some times from 1914 when the charter was destroyed for a year and until the appellees herein agreed on secession. And the bill shows that the Federation proceeded in accordance with the rules and regulations governing the conjoint associations (Tr., 194 to 208, Amended Bill).

Hence the appellees cannot at this time sustain the plea of *ultra vires;* first, because they have not made any offer to do equity or to place the parties to the action in statu quo; second, they have not shown any compliance whatever with the rules and regulations that govern and direct procedure within the conjoint associations; third, that the defense of *ultra vires* cannot be interposed to an executed contract, and where to allow it would be to permit injustice and to do intolerable wrong to the thousands upon

thousands of working miners who for twenty years have relied upon and acted in harmony with the fact that the Butte Union was a constituent part of the Western Federation of Miners.

And further, we declare that the appellees have in nowise sustained their plea, for the rule is, without dissent,

> That the burden of proof is upon the parties impeaching the acts of the corporation to show that such acts are not within its corporate powers.
>
> State v. Bank of Charleston (S. C., 1838), Dud Law, 187.
>
> Kappel v. Chaari Zedek Congregation, 19 Hun. (N. Y.), 364.
>
> Ellerman v. Chicago etc. Stockyards Co., 49 N. J. E., 217; 23 Atl., 287.
>
> Downing v. Mt. Washington Road Co., 40 N. H., 230.
>
> International etc. Ass'n No. 2 v. Wall, 153 Ind., 554; 55 N. E., 431.
>
> West v. Averill Grocery Co., 109 Iowa, 488; 80 N. W., 555.
>
> Allen v. West Point etc. Co., 132 Ala., 292; 31 So., 462.
>
> Chicago Pneumatic Tool Co. v. H. W. Johns Mfg. Co., 101 Ill. Appeal, 349.

On the trial below the question of the identity of the charters, that is the original charter, issued to Butte Miners' Union, May 15, 1893, and the copy supplied October 7th, 1914, was the main issue

argued in the court. At that hearing the matter was fully gone into.

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## STATEMENT OF FACTS AS TO CHARTER.

The call of the Butte Miners' Union upon other organizations to join the Butte Union in a Federation was answered and the convention called to order May 15, 1893, and on May 20, 1893, the secretary-treasurer of the Federation was ordered to get 100 charters printed (Tr., p. 511). The unions were at that meeting to the number of seventeen. June 16, 1893, they were given numbers. All had the identical charter.

It would have been subversive of the very purpose of the Federation if it had issued a charter without a forfeiture clause; it would have been against all precedent, because beneficial associations have reciprocal duties, and without reciprocal duties their activities are so limited that they cannot exist. In other words, a single, isolated body cannot accomplish objects of beneficence until it unites with and becomes subject to corresponding bodies throughout the different states, all acknowledging the authority of the supreme lodge of the particular order, from which it receives its general authority. To allow a body that has received moneys and benefits at any time to secede and take with it the books, papers, charters, moneys and properties which it has in possession,

would enable any local or subordinate body to withdraw from the main body and convert to its own use the property entrusted to it and the property which it had acquired as a conjoint associate.

All such property, of every kind and nature upon the secession of the local, or upon its becoming defunct or upon performing any act of forfeiture, becomes at once subject to the trusteeship of the governing body.

> Koener Lodge No. 6, K. of P. v. Grand Lodge K. of P. of Indiana, 146 Ind., 639; 45 N. E., 1103.
>
> Grand Lodge K. of P. etc. v. Germania Lodge No. 50; 56 N. J. Eq., 63; 38 Atl., 341.
>
> Schubert Lodge No. 118, K. of P. etc. v. Schubert Kranken Unterstuetzungs-Verin, 56 N. J. Eq., 78; 38 Atl., 347.
>
> Union Benev. Soc. No. 8 etc. v. Martin, 113 Ky., 25; 67 S. W., 38.

The fact that Butte Union is *incorporated* makes no difference in its relations to the superior body, which it itself organized and acts conjointly with.

A late case says:

> The mere incorporation of a subordinate lodge of a beneficial association does not render it INDEPENDENT of the ORDER, especially where it adopts a constiution and by-laws recognizing the supremacy of the national council and constitution and laws of the order.
>
> Commonwealth v. Heilman, 241 Pa., 374; 88 Atl., 666.

The union thus made is indissoluble, unless made in accordance with the rules and regulations of the order.

Freundschaft Lodge etc. v. Alchenburger, 235 Ill., 438; 85 N. E., 653.
(Affirming same case, 138 Ill. App., 204.)

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## TESTIMONY AS TO THE CHARTER.

Our contention is that any testimony regarding the charter dispute is outside of the record in this, that in their answer the appellees do not show any compliance with the rules and regulations of the Federation as to matters in dispute and emergencies provided for in the Constitution, rules and regulations, because a subordinate body is only entitled to appeal to the courts for the redress of administrative wrongs only after following the procedure and exhausting the remedies prescribed by the Constitution.

Schou v. Sotoyome Tribe No. 12 etc., 140 Cal., 254; 73 Pac., 996.

McGuiness v. City Ct. No. 1 etc., 78 Conn., 43; 60 Atl., 1023.

Moore v. National Council K. & L. of Security, 65 Kan., 452; 70 Pac., 352.

Whitty v. McCarthy, 20 R. I., 792; 36 Atl., 129.

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## RECEPTION OF THE CHARTER OF 1914.

Briefly, the Union had destroyed its charter in the turbulent times prevailing that year. They

applied for and received a reissuance of the charter. Now let us be governed by the record as to what action they took.

Testimony of Charles Baxter (Tr., p. 357):

> "Some one said we have received a new charter. Pat Leahy picked it up and read it and says 'we have no use for that; we don't want to lose our property,' and threw it on the table; no other action was taken at the meeting.
>
> Later it was tendered to Charley Mahoney as not being a *State* charter (p. 358). Lee tendered it back to Mahoney. The action was never afterwards brought before the local to my knowledge" (p. 408).

Testimony of Frank O'Connor (p. 435):

> "We rejected it (the charter) before we went to the meeting. Leahy objected to it and we decided not to accept it outside of the meeting. At any meeting at which I was present during the fall of 1914, after this charter of 1914 arrived, and the winter or spring of 1915, there was no action taken at any meeting of the union rejecting this charter, that I know of. * * * I conveyed the idea in my mind that we decided the charter was no good and we would not accept it."

Testimony of Pat Leahy (Tr., p. 441):

> "I made a little talk about this proposition of the charter and said how it read. Well, they said it ain't worth making a motion about it. They said it was not worth discussing (Tr., p. 443). They threw it in the waste basket. So when I brought it up at the meeting they said

> don't waste your time, throw it in the waste basket. I believe it was Lee who threw it in the waste basket (Tr., p. 445). It was tendered to Mahoney by Lee, but not at a regular meeting of the union (Tr., p. 447)."

Further, on November 24, 1914, Pat Lee, the secretary-treasurer of Butte Union, wrote as follows:

> "In reply to you concerning the charter, we have received it, but there is a little dispute about putting it up as some of the members wants a copy of the old charter from Helena, Mon't." (Tr., p. 315.)

There is ample provision in the Constitution and the regulations and by-laws to settle all disputes. The Federation was not given any opportunity to know whether the charter was acceptable and why it was not. Pat Lee merely writes that there is a dispute about it with the intimation that as soon as he hears from the secretary of state at Helena, Montana, he will communicate further. Nothing is done. The Federation continued to send its blanks and everything moved along as usual until June, 1915, when the schism occurred and the appellees decided to break the contract.

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## IDENTITY OF CHARTERS.

If, in its discretion, this court should deem it proper to go into the evidence as to the identity of the charter, that is the charter as issued May 15,

1893, and that sent to the union dated October, 1914, there will be no dissent from the proposition, that having pleaded the differences in the charter as an affirmative defense, the appellees must sustain that defense. Let us glance at the testimony they have introduced.

Charles Baxter (Tr., p. 357):

> "My attention was called to the forfeiture clause in the new charter which I never could recall having seen in the old one. Another difference was a lot of names attached to the old charter, not on the new one, but the body of the charter was the same except for the forfeiture clause. * * * To the best of my recollection it (the old charter) did not contain any forfeiture clause" (Tr., p. 407).

Evidently this witness confused the old state charter received from the state of Montana, in 1881, to which there was attached a large number of names, with the charter received May 15, 1893, and the later charter reissued October 3, 1914.

Jacob Oliver (Tr., p. 415):

> "I can't say exactly what the charter contained. I saw it hanging on the wall. I don't think that charter contained a forfeiture clause. * * * I think on the old charter there was a list of ten names. I saw the last charter received once."

William E. Deeney (Tr., p. 423):

> "This charter did not contain any forfeiture

clause of the property. We had some discussion about the old charter and as I remember it was to be adopted without the forfeiture clause.

The original charter did not contain the clause. I think Joe Thomas was president, and I don't remember who was secretary." (Tr., p. 430.)

We will ask the court to observe that this witness, Mr. Deeney, was present at the formation of the Federation, and that he recalls the president as Joe Thomas, and can't recall the secretary, but he can distinguish as to particular clauses in the charter. If his recollection was accurate, he would remember that John Gilligan was president of the Federation. He was selected from the Butte union, and W. J. Weeks was secretary and continued to be secretary for some years, and that the minutes of the Federation show no discussion of the charter. That a number of charters were ordered and printed and sent out to the locals, all identical in form and in wording and all containing the names of the officers of the Federation.

Frank O'Connor (Tr., p. 434):

"When the new charter came I offered my objections. It (the old charter) did not contain a forfeiture clause of the property of the Butte Miners' Union."

Pat Leahy (Tr., p. 441):

"I examined the old charter since I became a member of Butte union. The charter I refer

to did not contain a forfeiture clause of the property in case of withdrawal, suspension or dissolution. I guess that charter which was received in 1893 was blown to hell or some other foreign country, wherever it went I don't know, but the hall was blown up. * * * I read the charter that came in response to the request. It did not suit me. There were other differences. On the old charter was some twenty names."

Let us now examine the testimony as to the identity of the charters:

Patrick Meany for plaintiffs (Tr., p. 475):

"I contributed towards building the miners' union hall in 1881. I was acquainted with the original charter of 1893. Saw it hanging on the wall. I read it. There was a clause in that charter provided that in the event of withdrawal, suspension or other cause there was to be a change of the ownership of property and it was to become the property of the Federation. That was the general understanding when the Western Federation of Miners was formed. That provision was in the original charter that I saw in Butte Miners' Hall, the one that was issued in 1893."

J. C. Lowney (Tr., p. 569):

"I have been a member of the Federation since it was organized in 1893. I was familiar with the original charter issued by the executive board of the Western Federation of Miners in convention assembled in May and June, 1893, delivered to and used by the Butte Miners' local. The two instruments were identical in form and substance. The clause was identical and alike

and provided in each for the forfeiture of the property and money of the local organization in case they became defunct and went out of business."

James J. Maher (Tr., p. 339):

"I was secretary-treasurer of the Federation for some time and a member of the Butte Union; I issued charters; that is my signature to exhibit E (Tr., p. 339-340). I saw the original charter (Tr., p. 341) and it was identical with the Aspen charter."

Charles E. Mahoney (Tr., p. 473):

"I was in the court room when the testimony as to the charter of October, 1914, was given. At that time I informed the men that all these matters should be sent to the Federation. It was never sent to the officers of the Federation. I have seen the original charter. The contracts in the two charters were identical (Tr., p. 474), the one previously destroyed in the wrecking of the hall and this charter here; that is the wording of them."

Ernest Mills (Tr., p. 331):

"According to the records the first charter was drafted by a committee appointed by the convention and from that there has been no change in the charter other than by order of the convention at one time, the words 'of America' were left out; the style of the charter has been changed by order of the executive board, that is the makeup of it."

William E. Walsh (Tr., p. 335):

"In 1893 Mr. John Gilligan was president,

W. J. Weeks secretary of the Federation. I know all these men. The names at the bottom of this charter (the ASPEN charter set forth in full at Tr., page 334), William Cunningham, Bart Malloy, T. J. McLennan, Stephen Nichols and Joe Poynton. He went into Idaho and got into some dispute over there.

They were the committee of officers, of the first officers of the Western Federation of Miners and that is how their names come to be on the bottom of this charter. At one time I was an officer of the Western Federation of Miners, a member of the Executive Board, and acted as secretary-treasurer for a few months and as an officer of the Western Federation of Miners I issued several charters and signed them.

They were identical with the charter which you have just exhibited to me; the same charter. I was familiar with the Butte Miners' Union Charter, that is the charter from the Western Federation and it was identically the same in terms to the charter that you have exhibited to me."

We now submit that there can be no shadow of a suspicion but that the charter sent to the Butte Miners' Union under date of October 3, 1914, in response to their application for a new charter, and that delivered to them by the committee of their own officers, were identical and provided as all charters must provide for the proper control of the local's property when it became defunct, was suspended or dissolved.

## SUMMARY OF FACTS.

We now have before us, established by overwhelming proof, the following facts:

That in 1893 the Butte Miners' Union desired to form a Federation.

That it formed it mostly out of its own members and called to itself the aid of seventeen subordinate locals.

That in the years that passed those locals numbered from seventeen to sixty and now over one hundred different.

That it has participated in every annual and biennial convention except perhaps one.

That it has contributed its per capita tax and perhaps other assessments for twenty years.

That in 1914 it destroyed its own property; it then appealed for a new charter; this was granted and they worked under it until June, 1915.

On the bringing of this suit they have interposed *ultra vires* their corporate powers; a change in charter.

Both of these defenses in our view have signally failed. We have endeavored to set these matters forth with brevity, but your honors will recall that this means a history of over twenty years, and that with the militant determination of the appellees to seize this property for their own uses they have, with a fertility of imagination and an energy that is

admirable, injected a mass of immaterial matter that of course must be recognized and disposed of.

The issues are plain and clear. The associations have acted so long together, property rights have become so interdependent with the other locals, that plaintiff here could not discharge its duties as trustees if it should supinely permit the appellees to secede from the order with a view to ultimately breaking up the other local organizations that have relied upon a uniform course of action for a time that a right by prescription, by ancient custom, would arise, even if it were not a matter of express procedure.

The judgment is wrong and we feel should be reversed, and to that end we will ask of your honors a patient consideration of the matters to the end that justice may be done.

Respectfully submitted,

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